LIBRARY
SUPREME COURT, U. S.

FILED
OCT 7 1968
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 614

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT B. LANGWORTHY
GLENN THOMAS
JAMES J. MELCHING
Floor Three, Union National Bank Building
Kansas City, Missouri 64106
Attorneys for Petitioners

Of Counsel:

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY
Floor Three, Union National Bank Building
Kansas City, Missouri 64106
HOMER DAVIS
Leavenworth, Kansas
LEWIS, RICE, TUCKER, ALLEN & CHUBB
611 Olive Street
St. Louis, Missouri 63101

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Matter Involved 5

Reasons Relied On for the Allowance of the Writ 8

Conclusion 36

Certificate of Counsel 36

Appendix A-1—Revised Opinion of the United States Court of Appeals for the Tenth Circuit A1

Appendix A-2—Unrevised Pages of Opinion of the United States Court of Appeals for the Tenth Circuit A13

Appendix B—The Petition for Rehearing of Petitioners A15

Appendix C—The Judgment of the United States Court of Appeals A25

Appendix D—The Opinion of the United States District Court for the District of Kansas A27

Table of Authorities

CASES

Berry v. *Kuhl*, 174 F. 2d 565 (1949, C.C.A. 7th) 3, 14, 15, 27

Blanchard v. *Commonwealth Oil Co.*, 294 F. 2d 834 4

Carnes v. *United States*, 279 F. 2d 378 4

County of Imperial, State of California v. *United States*, 384 F. 2d 904 4

Ernst v. *Foster*, 58 Kan. 438 24

F. T. C. v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 4

Gammons v. *Hassett*, 121 F. 2d 229, certiorari denied 314 U.S. 673 ..... 3, 15, 16, 17

Henslee v. *Union Planters Bank*, 335 U.S. 595 3

Henslee v. *Union Planters National Bank & Trust Co.*, 69 S. Ct. 290 ..... 11, 13, 14, 15

In re Estate of Buckner, 186 Kan. 183 24

In re Estate of Ellertson, 157 Kan. 492 24

In re Estate of Woods, 181 Kan. 271, 311 P. 2d 359 ..... 3, 4, 18, 24, 25, 27, 28, 29, 30

Ithaca Trust Company v. *United States*, 279 U.S. 171, 49 S. Ct. 291 ..... 3, 9, 15, 16

Lucas v. *Mercantile Trust Co.*, 43 F. 2d 39 ..... 4, 17, 31, 32

Merchants National Bank of Boston v. *Commissioner of Internal Revenue*, 320 U.S. 256 ..... 3, 10, 13, 14, 15, 18, 19

Morse v. *Henlon*, 97 Kan. 399 24

National Life Ins. Co. v. *Watson*, 141 Kan. 903 24

Shanny v. *Strong*, 160 Kan. 206 24

Union Trust Co. v. *Tomlinson*, 355 F. 2d 40 (C.A. 5th) 3

United States v. *F. & M. Schafer Brewing Co.*, 78 S. Ct. 674 ..... 4, 35

United States v. *Powell*, 307 F. 2d 821 (1962, C.C.A. 10th) 3, 4, 17, 18, 19, 21, 22, 23, 24

United States v. *Wissahickon Tool Works*, 200 F. 2d 936 4

Williams v. *McKinney*, 34 Kan. 514 24

STATUTES

Internal Revenue Code, 1939, Sec. 811 (now Sec. 2041 of 1954 Code) 18

Revenue Ruling 54-285 Cumulative Bulletin 1954, Part II, Page 302 ..... 3, 9, 15

Rule 73(a), Federal Rules of Civil Procedure 34

Scott on Trusts, 2nd Ed., Vol. II, paragraph 183 22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, The Commercial National Bank of Kansas City and The Boatmen's National Bank of St. Louis, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit, which Court, on appeal from the judgment for Petitioners in the United States District Court for the District of Kansas holding the Frank E. Washburn Estate was entitled to a charitable deduction for a bequest in trust, reversed said judgment against Petitioners.

A timely Petition for Rehearing was filed but was denied by the Court of Appeals.

This suit involves a claim for refund of Estate Taxes unlawfully assessed by the United States Government but paid by Petitioners in the principal amount of $19,614.05.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Tenth Circuit is reported in ..... F. 2d ....., and appears in the appendix to this Petition as Appendix A, page A1. Only pages 12 and 13 of the final opinion were revised. These unrevised pages appear also in Appendix A, pages A13-A15.

The petition for rehearing of Petitioners filed June 17, 1968, appears in the appendix to this Petition as Appendix B, page A15.

The judgment of the United States Court of Appeals to be reviewed was entered on the docket July 5, 1968, and appears in the appendix to this Petition as Appendix C, page A25.

The opinion of the United States District Court for the District of Kansas is reported in 265 F. Supp. 806 (1966) and appears in the appendix to this petition as Appendix D, page A27.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the determination made by the Court of Appeals for the Tenth Circuit which determination is in direct con-

flict with an earlier decision of this Court involving whether the value of a charitable transfer allowable as a deduction for federal estate tax purposes may be disallowed where, the charitable corporation being the distributee of the principal of a trust, the trust permits invasion of the principal by the trustees for the benefit of the life beneficiary. The allowance and disallowance of charitable deductions with respect to estate tax returns under instruments which create benefits for both charitable and private purposes have been disputed in the Courts throughout the Land for many years. The *Ithaca Trust Company* case has been cited at least once every three months for over thirty years. It appears that it is time for this Court to take up the matter and permanently resolve the issues which have resulted in numerous inconsistent decisions and have plagued the legal profession both in and out of Government over the decades.

Ithaca Trust Company v. *United States*, 279 U.S. 171.

United States v. *Powell*, 307 F. 2d 821 (1962, C.C.A. 10th).

In re Estate of Woods, 181 Kan. 271, 311 P. 2d 359.

Berry v. *Kuhl*, 174 F. 2d 565 (1949, C.C.A. 7th).

Revenue Ruling 54-285 Cumulative Bulletin 1954, Part II, Page 302.

Henslee v. *Union Planters Bank*, 335 U.S. 595.

Merchants National Bank of Boston v. *Commissioner of Internal Revenue*, 320 U.S. 256.

Gammons v. *Hassett*, 121 F. 2d 229, certiorari denied 314 U.S. 673.

Union Trust Co. v. *Tomlinson*, 355 F. 2d 40 (C.A. 5th).

2. The decision below of the Tenth Circuit conflicts, not only with applicable decisions of this Court, but with its

own decision (*Powell*) involving the interpretation of trust provisions governed by Kansas law that may or may not limit the invasion of principal to the standard-of-living criterion. Also the Tenth Circuit's decision is in conflict with *Lucas* v. *Mercantile Trust Co.*, 43 F. 2d 39, a decision by the Eighth Circuit decided July 30, 1930, wherein substantially the same question was presented by the governing instrument with respect to powers of invasion for the life beneficiary

United States v. *Powell*, 307 F. 2d 821.

In re Estate of Woods, 181 Kan. 271.

Lucas v. *Mercantile Trust Co.*, 43 F. 2d 39.

3. The Court of Appeals erred in dismissing Petitioner's Motion To Dismiss Appeal which motion was filed on the grounds that the Notice of Appeal by the United States was not filed within sixty (60) days from the date of the judgment appealed from in the District Court.

Blanchard v. *Commonwealth Oil Co.*, 294 F. 2d 834.

Carnes v. *United States*, 279 F. 2d 378.

United States v. *Wissahickon Tool Works*, 200 F. 2d 936.

County of Imperial, State of California v. *United States*, 384 F. 2d 904.

F. T. C. v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206.

United States v. *F. & M. Schafer Brewing Co.*, 78 S. Ct. 674.

STATEMENT OF THE MATTER INVOLVED

On June 19, 1954, Frank E. Washburn executed his will bequeathing his residuary estate to his wife, Lucy Tullock Washburn, or, if she failed to survive him, one-sixth each to four nephews and one-sixth each to the Cushing Memorial Hospital Corporation, of Leavenworth, Kansas, and to the University of Wisconsin.

Also on June 19, 1954, Mr. Washburn established a revocable trust the income from which was payable to himself during his lifetime, to his surviving spouse thereafter, but if she predeceased him or after her death, to his (Mr. Washburn's) sister, if she survived. The Trust Agreement provided that upon the death of the wife and the sister, or upon decedent's death if both predeceased him, the trust estate was to terminate and the net principal and net undistributed income remaining would go one-sixth each to four nephews and one-sixth each to the Cushing Memorial Hospital Corporation and to the University of Wisconsin.

Paragraph 5 of the aforementioned Trust Agreement provided (R-23):

> "5. In the event that the Grantor's wife, Lucy Tullock Washburn, shall survive the Grantor, and the Trust Estate hereby created shall not have theretofore been terminated, then in that event, if at any time or times during the lifetime of the Grantor's said wife, some emergency or contingency shall arise making it necessary or advisable in the sole judgment of the Trustee to pay or distribute to or apply for the benefit of the Grantor's said wife for her comfort, welfare, contentment and happiness, a portion or portions of the principal of said Trust Estate, the Trustee shall have full power and authority to pay or distribute to her, or to use or apply for her benefit

for her comfort, welfare, contentment and happiness, such portion of the principal of said Trust Estate as the Trustee in its sole discretion shall deem necessary or advisable in all of the circumstances then existing. In determining the necessity or advisability of making such payments or distributions out of principal to the Grantor's said wife from the Trust Estate, the Trustee may take into consideration other income and cash resources available to the Grantor's said wife, and the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live; and that while said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's wife shall live, her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Trust Agreement."

At the date of death of Frank E. Washburn, his surviving spouse, Lucy Tullock Washburn, had on deposit in her own revocable inter vivos trust at the Boatmen's National Bank of St. Louis, cashable income producing securities worth $533,000.00; cash on deposit at that bank of $15,000.00; immediately saleable government and municipal bonds worth $99,000.00; an immediate interest of $110,316.91 in her husband's estate; and real estate in her own name worth $39,500.00. At the date of her husband's death, Lucy Tullock Washburn, had an annual income of more than $29,000.00 consisting of $15,600.00 per year from her own trust at The Boatmen's National Bank of

St. Louis, $7,500.00 per year from the Frank E. Washburn Trust, more than $3,000.00 per year in interest income from government and municipal bonds, and approximately $3,000.00 per year starting at the date of his death on the $110,316.91 inherited from her husband. (R. 10-11, 41-42)

Prior to the death of the decedent, the living expenses of Mr. and Mrs. Washburn averaged about $21,000.00 per year of which the wife paid two-thirds and the husband paid one-third. From the date of death of Mr. Washburn through the date of death of Mrs. Washburn, some six years later, living expenses never exceeded $21,000.00 per year for Mrs. Washburn. Included in this $21,000.00 figure were taxes in the approximate amount of $10,000.00 per year and contributions to charities of about $750.00 per year. (R. 42)

A Federal Estate tax return was timely filed on behalf of the estate on June 25, 1958, disclosing an estate tax liability of $31,920.44, which sum was remitted with the return.

Upon subsequent audit of the return, a deficiency in tax of $39,212.04, together with interest of $7,508.30, a total of $46,720.34, was assessed and paid by the representatives of the estate. The deficiency was based on the disallowance of charitable deductions with respect to the remainder interests passing to the Cushing Memorial Hospital Corporation and the University of Wisconsin under the above-mentioned trust, and on several other adjustments which are no longer in controversy.

Following the payment of a refund by the Commissioner upon issues not relevant here, the estate's representatives on September 17, 1963 filed a second timely claim for refund in the amount of $19,614.05, which was

disallowed by statutory notice of disallowance dated December 16, 1963. An action was filed in the Federal District Court for the District of Kansas which resulted in a summary judgment in favor of the taxpayers. The District Court found from the undisputed facts that at the date of the decedent's death, his widow was possessed of a personal estate more than twice the size of that constituting the corpus of the Frank E. Washburn Trust; that the widow's estate alone produced income in excess of that required to maintain the widow's standard of living; that the size of her personal estate increased during the period between her husband's death and her own; that she received outright a bequest of better than $100,000.00 from her husband's estate; and that her standard of living was modest. The District Court further found that the possibility of invasion of the corpus by the Trustee was so unlikely as to be neglible. The United States appealed the decision of the District Court to the Tenth Circuit Court of Appeals which court reversed the lower court's decision and remanded the case for entry of judgment consistent with its opinion.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Whether this Court should grant certiorari to review the determination made by the Court of Appeals for the Tenth Circuit which is in direct conflict with an earlier decision of this court, the nature of the controversy being whether the value of a charitable transfer allowable as a deduction for federal estate tax purposes may be disallowed where, the charitable corporation being the distributee of the principal of a trust, the trust permits invasion of the principal by the trustees for the benefit of the life beneficiary.

The controlling legal decision applicable to the facts of this case was announced in *Ithaca Trust Company* v. *United States*, 279 U.S. 171, 49 S. Ct. 291, wherein this Court held that where a provision in the governing instrument contains a standard of living clause the charitable deduction is to be allowed if at the date of the decedent's death there is enough money in sight to continue that standard of living without invading the corpus of the trust estate. The Treasury Department has developed a ruling in accordance with the *Ithaca* holding, Revenue Ruling 54-285 Cumulative Bulletin 1954, Part II, Page 302, which recites that where there is an ascertainable standard governing comfort and support, the charitable deduction is allowed where the probability of invasion of the corpus is so remote as to be negligible. In the case at hand, the probability of invasion of the trust corpus is so remote as to be negligible in view of the surviving spouse's individual wealth, annual income and her living expenses.

In *Ithaca* the decedent gave to a corporate trustee the residue of his estate for the benefit of his wife for life with authority to use from the principal any sum *"that may be necessary to suitably maintain her in as much comfort as she now enjoys."* After the wife's death the remainder interests were to go to certain charities.

In this monumental decision this Court held that principal of the trust could be used for the wife, only if necessary and then only to continue the standard of living enjoyed at the time of decedent's death. It was also held that the standard was fixed in fact and capable of being stated in definite terms of money *AND IT was not left to the widow's discretion.* It was further determined that since funds were available to pay debts, specific legacies

and expenses of administration with sufficient amounts thereafter to maintain the widow as required, *there was no uncertainty appreciably greater than the general uncertainty that attends human affairs.*

From this it must be concluded that (1) if a standard exists, (2) there are adequate assets available, and (3) the discretion to invade is not in the widow but in one who must act in accordance with trustee standards, the Government bears no risk appreciably greater *than the general uncertainty that attends human affairs.*

There is no doubt but that the provisions of paragraph 5 of the Trust Agreement set out an ascertainable standard and the discretion to invade is *solely* in the Trustee. The widow was entitled to distributions from corpus only if she could show she was in need of funds to continue the standard of living she enjoyed at the time of her husband's death. In view of Mrs. Washburn's substantial estate in her own right, it is virtually inconceivable that an invasion of principal would ever have taken place for her benefit.

The United States relies heavily on two decisions of this Court to support its contention for disallowance of the charitable deduction. The first case, *Merchants National Bank of Boston* v. *Commissioner*, 320 U.S. 256, involved an instrument that permitted invasion of principal—

> "at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the Trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this Trust."

In developing the question to be resolved, this Court determined that the case turned on whether the bequests to the charities had, as of the testator's death, a *presently ascertainable* value. In other words, whether, as of that time, the extent to which the widow would divert the corpus from the charities could be measured accurately.

It was reasoned that the aforementioned provisions of the governing instrument were not restricted by a fixed standard based on the widow's prior way of life. (In *Ithaca*, of course, as in the case at hand, a definite standard is spelled out unequivocally.) From this it is obvious that a decision disallowing the charitable deduction was in order. The trustee was instructed to honor the wishes of the wife and without a standard to go by, it, of course, was readily discernible that the risk was on the Government, despite the fact the widow's previous mode of life was modest and her own resources substantial.

It is to be noted that this Court did discuss the widow's *happiness* as being a factor which the trustee had to consider in making any distributions. Such a word by itself, of course, could not be controlling with respect to allowance or disallowance of the deduction but when no standard has been provided as a guide, it then becomes apparent that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction. This would follow, it seems, irrespective of the words used, whether they be *happiness, benefit, enjoyment, welfare, etc.*

The second case on which the United States relies is *Henslee* v. *Union Planters National Bank & Trust Co.*, 69 S. Ct. 290. There the governing instrument left the decedent's estate to the bank in trust for his mother for life with the following provisions and directions to the trustees:

"I hereby direct both my executors and my Trustee to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

Again we see a most noticeable absence of a standard as required by the *Ithaca* decision. This then throws the matter into the same area that *Merchants* covered. Without an ascertainable standard and with power to invade resting in the life beneficiary and the trustee being directed to cater to the whims of the life beneficiary, it is obvious that the remaindermen are not protected by strict trustee standards as in *Ithaca* and the risk is appreciably greater *than the general uncertainty that attends human affairs.*

This Court's determination in *Henslee* was again made on the absence of an acceptable standard. At 69 S. Ct. 292, it was stated:

". . . It is apparent on the face of the complaint that this testator's will did not limit the trustee's disburse-

ments to conformity with some ready standard—as where, for example, trustees are to provide the prime beneficiary with such sums as 'may be necessary to suitably maintain her in as much comfort *as she now enjoys.*' (Emphasis supplied.) Ithaca Trust Co. v. United States, 279 U.S. 151, 154, 49 S. Ct. 291, 73 L. Ed. 647. The stated income here directed to be paid to the mother was 'to be used by her as she sees fit.' Beyond this the trustees were empowered to invade or wholly utilize the corpus of the estate for the mother's 'pleasure, comfort, and welfare,' bearing in mind the testator's injunction that

> "The first object to be accomplished * * * is to take care of and provide for my mother in such manner as she may desire * * *." As in the Merchants National Bank of Boston case (320 U.S. 256, 64 S. Ct. 111), where the trustees have discretion to disburse sums for the "comfort, support, maintenance, and/or happiness" of the prime beneficiary, so here we think it the "salient fact * * * that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction." 320 U.S. 256, 262, 64 S. Ct. 108, 112, 88 L. Ed. 35.

Petitioners are cognizant of the fact that *Merchants* and *Henslee* are two cases decided by a divided Court and also go only to the extent that if the governing instrument fails to state an ascertainable standard, then the charitable deduction fails. The late Mr. Justice Frankfurter who reversed himself from the majority in *Merchants* to the dissenters in *Henslee*, stated—

> "Wisdom too often never comes, and so one ought not to reject it merely because it comes late. Since I now realize that I should have joined the Dissenters in the Merchants National Bank of Boston case, 320 U.S. 256, 64 S. Ct. 108, 88 L. Ed. 35, I shall not compound error by pushing that decision still farther. I

would affirm the judgment, substantially for the reasons given below, 6 Cir., 166 F. 2d 993."

Mr. Justice Minton, then Judge in the Circuit Court deciding *Berry* v. *Kuhl*, 174 F. 2d 565, after considering both lines of decisions stated the rule to be:

> "The charitable interest is deductible in full where the power of private beneficiary to invade the corpus is limited by a standard fixed by the terms of the Will and capable of being stated in terms of money and where the circumstances (resources) of the private beneficiary indicate possibility of invasion is remote.
>
> "Where, on the other hand, no measurable standard is fixed by the Will to limit the power of invasion, no deduction for the charitable interest will be allowed."

From this it is therefore obvious, that, as the decisions themselves hold, it is not the use of the word "happiness," or "desire," or "wishes" that is of bone crushing importance. No matter what the language is, the salient point as pointed out in *Merchants* and as restated by Mr. Justice Minton, is whether or not there is a living standard fixed in the governing instrument to measure what the Trustee may withdraw from corpus. It is to be noted that Justice Minton does not mention the words *happiness, desire, wishes* or the like, he speaks only of the presence or absence of a standard of living clause.

It is true that *Merchants, Henslee* and the others discuss the use of the words *happiness, pleasure, desire, wishes* and the like but then in the total absence of a standard of living clause there was simply nothing else to discuss. It seems correct to assume, after analyzing the *Merchants* line of cases, the result would necessarily have been the same, even if the words *happiness, pleas-*

ure, wishes or *desire* had not been used at all. In each of the cases the real or salient reason for the disallowance was the total absence of any standard by which the probable extent, if any, of invasion could be measured in money as was succinctly stated in *Berry*.

The *Ithaca* case has been epitomized by the United States Treasury Department in its Revenue Ruling 54-285, Cumulative Bulletin 1954 Part II, Page 302, which states as follows:

> "(1) There must be an ascertainable standard covering comfort and support which may be either express or implied, and
>
> (2) The probability of invasion is remote or the extent of the invasion is calculable in accordance with some ascertainable standard."

The decisions denying charitable deductions with respect to estate tax matters, are those having no standard of living clause. Such decisions are not relevant to this case.

The promulgation of this ruling must have been brought about in view of the problems presented in such cases as *Merchants* and *Henslee* and the forerunner of these two decisions, *Gammons* v. *Hassett*, 121 F. 2d 229, certiorari denied, 314 U.S. 673. The will in the latter case, after payment of debts, specific bequests, etc., provided as follows:

> "1. All the rest, residue and remainder of my property, of whatever nature, and wherever situated, including all property over which I now have, or may hereafter acquire, the power of disposition, I give, devise and bequeath to my Trustees, in trust, nevertheless, for the following purposes: to be held by them, the income thereof, after paying all reasonable expenses of the trust, indulging a reasonable compen-

sation for the services of my Trustees, and so much of the principal thereof *as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life.*

* *

"3. I direct my said Trustees to transfer, make over and distribute the rest, residue and remainder of my estate to the New England Grenfell Association, of 25 Huntington Avenue, Boston, Massachusetts, and the Society for Prevention of Cruelty to Animals, of Boston, Massachusetts, share and share alike, free and discharged of any trust."

The question presented to the Court was whether the bequests to the charities were sufficiently definite and ascertainable as of the date of the death of the testator to be deductible from the gross estate.

In reasoning that the charitable gift was not definitely ascertainable at time of testator's death, the Court recognized the fact that the language of the will did not establish a standard required by *Ithaca*. The Court went on to state:

". . . The power to invade the principal is not restricted to the life tenant's needs; the widow may invade it as she desires. We know of no standard fixed in fact by which we could measure either the extent of the life tenant's desires or the likelihood of an exercise of those desires, so that we could place a definite value on the charitable bequests. While we grant that the likelihood of invasion of the principal was extremely remote at the testator's death, still the possibility of invasion did exist and, therefore, the amount of the property which would go to charity was uncertain."

The Court in *Gammons* quoted from the *Ithaca* opinion in the course of making its points with respect to a *standard* and *widow's discretion*:

> "The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion."

From *Gammons* and the other landmark decisions involving charitable deductions for remainder interests, the issues have necessarily revolved around (1) the ascertainable standard, (2) availability of assets and (3) the life beneficiary's power to invade to the detriment of the charities. In resolving such issues the Courts have found it necessary to interpret the governing instruments under the applicable state law, since state laws create legal interests and rights and the federal revenue acts designate what interests or rights, so created, shall be taxed. With this in mind and applying the Kansas law to the provisions of the instrument at hand, a second important factor for determination presents itself. The following question Number Two of Petitioners is indeed a valid one to bring the issue to the attention of this Court so that justice will prevail.

2. The decision of the Tenth Circuit conflicts, not only with applicable decisions of this Court, but with its own decision (*Powell*) involving the interpretation of the trust provisions governed by Kansas law that may or may not limit the invasion of principal to the standard of living criterion. Also the decision of the Tenth Circuit is in conflict with *Lucas* v. *Mercantile Trust Company*, 43 F. 2d 39, decided by the Eighth Circuit in 1930, wherein substantially the same question was presented by the governing instrument with respect to powers of invasion for the life beneficiary.

Considerable effort has been expended by the respondents in pressing for the application of Merchants

to the situation before us. And despite the fact the Tenth Circuit in its decision has unequivocally stated—

> "Thus our problem may be stated as whether, under the law of Kansas, Paragraph 5 of the trust limits the invasion of principal to the standard-of-living criterion."

it has based its decision on cases interpreting instruments governed by Massachusetts law and other jurisdictions. In this connection it must be stated that whatever may be the reach of the word *happiness* in a Massachusetts will (*Merchants*), which does not contain any semblance of a standard of living clause, the established law of Kansas is that in a Kansas will which does contain a standard of living clause, the use of the word *happiness* does not enlarge this standard. The controlling cases with respect to instruments governed by Kansas law is *In re Estate of Woods,* 181 Kan. 271 and *United States* v. *Powell,* 307 F. 2d 821.

The *Powell* case did not involve a charitable remainder deduction question as was first thought by the Tenth Circuit on page 12 of its original opinion. See Appendix A1, page A10. *Powell* involved an instrument containing a Power of Appointment provision as contemplated under Section 811 of the 1939 Internal Revenue Code, now Section 2041 of the 1954 Code. The instrument provided with respect to invasion by the Grantor for the benefit of the life tenants, as follows:

> "Fifth: If, at any time during the continuance of this trust, it is necessary or advisable to use *some portion of the principal for the maintenance, welfare, comfort, or happiness of the Grantor's wife,* * * * *or Grantor's daughters,* * * * or for the education of Grantor's said daughters, the Trustee is hereby authorized and empowered to use so much of the

> principal as in the discretion of the Trustee is necessary or advisable to be used to meet such conditions, and *provided that the Trustee shall deem that the purpose for which the payments are to be made, justifies the reduction in the principal of the trust properties.* * * *" (Emphasis added.)

In view of the foregoing provisions, the Government contended that a trust created by the decedent (Mr. Powell) some 22 years before his death was includible in his gross estate for Federal estate tax purposes. In creating the trust, Mr. Powell named himself as a joint trustee with certain powers that gave rise to the contention that for virtually all intents and purposes the retention of said powers made him (Mr. Powell) the equitable owner of the trust assets at his death and accordingly should be taxed pursuant to the provisions of the tax laws.

The *Merchants* case was discussed in the *Powell* decision. The opinion of the Tenth Circuit among other things stated with respect to this Court's decision in *Merchants*:

> "It is clear, we think, that the Court accorded such broader connotation to the word 'happiness,' because of the context in which it was found, and, particularly, the instructions to the Trustee to exercise its discretion with liberality to the wife and to consider her welfare, comfort and happiness prior to the claims of the residuary beneficiaries."

The Tenth Circuit further reasoned that the *Powell* instrument not only did not provide that the power to invade the corpus should be exercised with liberality and to gratify the wishes of the beneficiaries, but, on the contrary, indicated that the power should be exercised with restraint and only when the purpose justified a reduction of the corpus. It accordingly concluded that the exercise

of discretion to invade the corpus with liberality and in accordance with the wishes of a beneficiary is not a power restricted by a fixed standard. Finally, with respect to the *power to invade corpus,* it was determined that there was nothing in the context of the Powell instrument in which the term *happiness* is found, or in the instrument as a whole, that indicated an intent that it should be given a broader connotation than its usual and ordinary meaning. It was found that the qualifying language—

> ". . . *provided that the trustee shall deem that the purpose for which the payments are to be made, justifies the reduction in the principal of the trust properties.*" (Emphasis supplied.)

indicated the contrary. The Washburn instrument specifically admonishes the trustee not to deplete the trust estate—

> "by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live."

From this it follows, that any reduction in corpus would have to be justified and in this respect it is important to note that the Grantor's wife (Mrs. Washburn) had nothing to say in regard to invasions for her benefit. The final portion of paragraph 5 of the Trust Agreement—

> "her enjoyment of the benefits *of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Trust Agreement.*" (Emphasis supplied.)

means nothing more than (1) the Grantor's wife (Mrs. Washburn) is entitled to the trust assets first, but *not* in excess of the standard of living requirement previously set forth and (2) the Trustee is protected from a re-

mainderman who might claim that the Trustee favored one beneficiary over another without sufficient authorization.

The *Powell* opinion set forth excellent reasoning that is most appropriate for the case at hand and had it been applied properly, Petitioners would not be here involved as Petitioners. In *Powell*, the Government contended that by using the word *happiness*, complete and unbridled authority was vested in the Grantor. This was rejected with the Court reasoning that Kansas law had to be considered:

> "[1] The trust instrument was executed and was to be carried out in the State of Kansas, for benefit of persons who were citizens and residents of that state. It was governed, therefore, by Kansas law.
>
> "[2] It is well settled, under the law of Kansas, that a court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion. The Supreme Court of Kansas so held in Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541, 543, with respect to a trust instrument which gave large discretionary powers to the trustee. It reiterated that doctrine in In re Porter's Estate, 164 Kan. 92, 187 P. 2d 520, 525, in which the court said:
>
> 'Notwithstanding the powers and discretion given to the trustee he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuses of the trust.'
>
> "[3, 4] In our opinion, the instrument gave the trustees no such unbridled discretionary power or authority. It is well settled that where there are two or more beneficiaries of a trust, it is the duty of the trustee to administer the trust impartially, as

between the beneficiaries, and where a Trustee under a trust is directed to pay the income to a beneficiary during his life and on his death to pay the income from the trust or the corpus to another beneficiary, it is the duty of the trustee so to administer the trust as to preserve a fair balance between them."

The latter part of the above-quoted portion of the *Powell* opinion was taken from Scott on Trusts, 2nd Ed., Vol. II, at paragraph 183, perhaps the foremost trust authority in modern American Jurisprudence.

The *Powell* opinion also delves into the meaning of the word happiness as used in the governing instrument, pages 826 and 827 of the report:

"The usual and ordinary meaning of 'happiness' is a 'state of well-being characterized by relative permanence.' Webster's New International Dictionary, Second Ed., Unabridged, p. 1136. It is synonymous with 'comfort' or 'welfare.' Macmillan's Modern Dictionary, Rev. Ed. 1944; Webster's New International Dictionary, Second Ed., Unabridged, p. 2900. It is 'that more permanent enjoyment of life which attends on, and is almost identical with, welfare.' 39 C.J.S. Happiness, p. 773. Webster's New Collegiate Dictionary, 11th Ed., 1959, p. 375, defines 'happy' as 'enjoying well-being, peace, and comfort.'

"Webster's New International Dictionary, Second Ed., Unabridged, p. 2900, defines 'welfare' as 'state or condition in regard to well-being; esp, condition of health, happiness, prosperity, or the like.' In its ordinary sense 'happiness' has the characteristic of permanence or endurance, as distinguished from pleasure, which is transitory. Funk and Wagnall's Synonyms, Antonyms and Prepositions, Rev. Ed. 1947, delineates the objective qualities of 'happiness,' as contrasted with 'pleasure,' as follows:

> 'Happiness is * * * more serene and rational than pleasure; pleasure is of necessity transient; happiness is abiding; thus, we speak of pleasures, but the plural of happiness is scarcely used. Happiness, in the full sense, is mental or spiritual or both, and is viewed as resulting from some worthy gratification or satisfaction; we can speak of vicious pleasure or delight, but not of vicious happiness * * *.'
>
> There are many adjudicated cases holding that the terms 'happiness,' 'welfare,' and 'comfort' are synonymous."

The Tenth Circuit in *Powell* concluded that the word *happiness*, as it appeared in the applicable instrument, was synonymous with welfare and comfort and recognized the fact that the words *welfare* and *comfort* provide an ascertainable and judicially enforceable external standard. It was further stated:

> "We conclude that the provisions in the trust instrument giving the trustees power to use the corpus 'for the maintenance, welfare, comfort or happiness' of the beneficiaries and for the education of the daughters, the remaindermen, 'provided * * * the purpose for which the payments are to be made,' justifies the reduction in the corpus, established an ascertainable, external and judicially enforceable standard and that the trustees, in exercising such power, were limited by such standard and the supervision and control of the courts of Kansas in the exercise of their equity powers.'"

From this opinion, which clearly set the record straight with reference to the use of the word happiness in a Kansas instrument and as it applies to an ascertainable standard, it is most difficult to understand why such a radical turnabout can be pursued in the case at hand. It

is nothing more than verbal hairsplitting of the most offensive type. The Tenth Circuit has ignored its interpretation of the Kansas law as set out in *Powell* and has virtually based its decision on a use of the word *happiness* which is contrary to Kansas law.

Under the law of Kansas, it is not permissible to pick out some single words or phrases to determine intention but on the contrary the whole instrument in its entirety is to be considered. See *Williams* v. *McKinney*, 34 Kan. 514; *In re Estate of Buckner*, 186 Kan. 183; *In re Estate of Ellertson*, 157 Kan. 492; *Morse* v. *Henlon*, 97 Kan. 399; *Ernst* v. *Foster*, 58 Kan. 438; *Shanny* v. *Strong*, 160 Kan. 206; *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *In re Estate of Woods*, 181 Kan. 271; *United States* v. *Powell*, 307 F. 2d 821. The Kansas law is also clear on the point that it is not permissible to employ rules of construction where the intention is expressed clearly and unequivocally in the will. See *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *Morse* v. *Henlon*, 97 Kan. 399; and *In re Estate of Ellertson*, 157 Kan. 492.

The fundamental Kansas rule regarding the interpretation of testamentary instruments must be realized. This rule is that the intention of the testator is to be gathered from the will as a whole and that intention must prevail if it is consistent with the rules of law. As the Kansas Supreme Court stated in *Ellertson*:

> "The will is to be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the purposes of the testator as gathered from the entire will, and to effectuate rather than defeat the intention of the testator. Controlling significance is not to be given to one of the terms of devise or bequest and other terms ignored."

From this it is apparent that, if Mrs. Washburn had attempted to defeat the interests of the remaindermen by relying on the part—

> ". . . her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees . . ."

an insurmountable obstacle in the form of the Kansas Supreme Court decision *In re Estate of Woods*, 181 Kan. 271, 311 P. 2d 359, would have presented itself.

In Woods, the decedent's will provided for trust income to his wife Frances for life then income to his daughter Catherine for life, remainder to charity. Paragraphs 5 (d) and 5 (e) of the will provided for invasion of corpus:

> "5 (d) Wherefore it is my will and desire that throughout their lives my wife (Frances) and daughter (Catherine) shall possess all the necessities and such luxuries as they have, generally speaking grown accustomed to during my life and if after my death the income from the trust estate shall fail to fully provide such necessities, comforts and luxuries, it is my will and desire that there shall be paid to my wife during her lifetime out of the funds of my estate and additional sums above the annual income, needed for her comforts, and even for any desired luxuries. And the same generous treatment is to be given my daughter, Catherine, after my wife's death, if there should be need, after considering her own separate resources and income a full report of which should be given at any time asked by my executor."

> "5 (a) To my executor and to his successors, if any, I make it plain that the essence of this testament is that the funds of my estate are to be used first to provide for the comfort and happiness of my wife,

Frances Woods, during her lifetime, and after my wife's death to provide for the comfort, and happiness of my daughter, Catherine Billings. That in case either shall become mentally or otherwise incapacitated, she shall be constantly provided with the utmost in care, comfort, and medical attention. And to effect these requirements I direct that the funds of the estate be applied without stint or quibble. This is my living responsibility and I direct that it be continued after my death to the last penny of my estate, if necessary to serve my wife, whose active intelligent and self sacrificing help in building that estate is hereby gratefully and lovingly acknowledged."

The Kansas Supreme Court held that the widow and daughter were to have all the necessities, comforts and luxuries as they had, generally speaking grown accustomed to during testator's life, saying at page 277 of the State Reports:

"As has often been said, the intentions of a testator must be determined from the whole Will—from the four corners of the instrument. Had the Will stopped with sub-paragraph (b) (relating to the income only) such a conclusion as that reached by the trial court may have been more tenable but the further provisions of sub-paragraph 5 (d) (quoted above) and the early part of 5 (e) (also quoted above) make it clear that Frances and Catherine were to possess all the necessities, comforts and such luxuries, as they had generally speaking grown accustomed to during testator's life." (Emphasis supplied.)

It was further pointed out by the Court that Catherine was entitled to the proceeds of the corpus from time to time to keep her in that position in life intended by the testator, which as quoted above was:

". . . to possess (that is enjoy) all the necessities, comforts and such luxuries as they had generally speaking *grown accustomed to during* his life." (Emphasis supplied.)

Of special import is the fact that the Kansas Court did not consider that the word happiness used in the will was of any particular significance. The decision was based upon the entire language as modified by the standard of living clause. This treatment is in accordance with the Federal decisions as summarized in *Berry v. Kuhl*, 174 F. 2d 565.

Inasmuch as the state court decision is controlling in the interpretation of a testamentary disposition, we are forced to conclude that *Woods* occupies the position of the ruling case in interpreting the Frank E. Washburn Trust Agreement, since both of the governing instruments substantially match each other in the critical parts. For example, the *Woods* language *comfort* and *happiness* is matched by the *Washburn* language *comfort, welfare, contentment* and *happiness; Woods* language *grown accustomed* is matched by the Washburn phrase *she has been accustomed; Woods* Trustees were instructed to invade corpus if need be for the wife and daughter to *possess all the necessities, comforts and such luxuries as they had generally speaking grown accustomed to while* the *Washburn* Trustee was instructed to invade corpus if need be for the wife to *continue to live in the manner in which she has been accustomed;* and finally, the Woods Trustees were instructed that *to effect these requirements they could invade corpus without stint or quibble—to the last penny* which provision is matched by the *Washburn* instruction to his Trustee—*her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the*

benefit of the distributees hereafter named in paragraph 9 of this Trust Agreement.

While the language of the Washburn Trust Agreement which states *that her enjoyment of the benefits of the Trust Estate are to be considered paramount to the conserving of assets for distributees* is probably more lawyerlike than the use of the words *without stint or quibble —to the last penny,* both provisions mean the same and perform the same function. Such a provision is to protect the Trustee from possible claim for surcharge, if and when the Trustee should find it necessary or advisable to use corpus for enabling the wife and daughter in Woods or Lucy Tullock Washburn in the case at hand, respectively:

> *to possess all the necessities and such luxuries as they have generally speaking grown accustomed to during my life*
>
> or
>
> *in order that she may continue to live in the manner in which she has been accustomed to live.*

A provision of this sort, expressed in some way or other is a legal requirement of a properly prepared testamentary instrument containing provisions for lifetime support and remainder over to charity or in any other case where there is a possibility that the Trustee may possibly have to choose whether to prefer the rights of one beneficiary over another and be subject to surcharge in the absence of such provisions.

In its opinion in the case at hand the Tenth Circuit in discussing *Woods* found—

> "Woods does offer some support for the proposition that under Kansas law the word *happiness* does not

broaden the standard-of-living-test. However, it is far from a direct holding to that effect. The court did not have occasion to pass upon the permissible scope of the power of invasion. The question before it was whether the beneficiary's funds had been sufficiently *depleted* to allow her to receive income from the trust. The court never considered the question of whether she was entitled to funds, in excess of those necessary to maintain her standard of living. Only if it had, would the questions before us have been decided. In view of the almost unanimous holdings of the courts that *happiness* creates a broader, more subjective test than the standard-of-living clause we are unable to conclude from *Woods* that Kansas would limit invasion of corpus in the instant case to the standard-of-living criterion." (Emphasis supplied.)

Petitioners cannot accept such a finding in view of the *Woods* decision and especially the following part of the opinion—

> "We can see no other result to this phase of the lawsuit than that Catherine is entitled to the net proceeds of testator's estate and if the executor-trustee is of the opinion that such a share is too large, then it is his right to request, and her duty to furnish, a report so that it can be determined by the executor-trustee, and in turn by the court, to what sums she is entitled from time to time to keep her in that position in life intended by the testator."

This pronouncement by the Supreme Court of Kansas is conclusive to the effect that the provisions in the will established an ascertainable standard and the life beneficiaries were entitled to only that amount necessary to keep them in that position of life intended by the testator, i.e., the standard of living enjoyed at the time of testator's death. Also the Kansas Supreme Court acknowledged the well-

settled law of Kansas that a Court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion.

So from the *Woods* case, it must be concluded that the trustees, in the case at hand, would have invited surcharge and litigation had they indiscriminately administered the trust in favor of the life beneficiary to the detriment of the remaindermen, i.e., had they provided more than what was necessary to maintain that certain standard of living of the life beneficiary.

It has always been the rule and practice in the federal judicial system that when a question of state law is involved, the federal courts will generally defer to the decision of a jurist sitting in a court (state or federal) located in the state in question, especially where such jurist has a background of long years of practice as an attorney at the bar of the state in question. In the present case, District Judge Arthur Stanley, Jr., who rendered the decision in the trial court, eminently meets these qualifications, and ruled in this case that as a matter of Kansas state law, the instrument in question is to be interpreted as providing an ascertainable standard, and that the word "happiness" is governed and limited by the standard of living clause. Yet the Court of Appeals, speaking through a panel of judges none of whom has ever practiced in Kansas or sat as a judge in a Kansas state court or the United States District Court for Kansas, saw fit to reject and disregard Judge Stanley's decision on a question of Kansas state law.

We had thought that this Court had long since made clear its policy that federal courts should defer to jurists experienced in the law of the state in question in cases like this, but since the Court of Appeals has ignored this

policy, we submit that it is important for this Court to clarify, amplify and re-emphasize its policy in this area, which is one of general importance to the federal judicial system.

Where there is a standard of living clause in the governing instrument, or even where from the manifest but unexpressed intention of the testator a standard of living clause can be implied, the charitable deduction has been allowed even though the widow is expressly authorized to take what she wants. Thus in *Lucas* v. *Mercantile Trust Company*, 43 F. 2d 39, the will left remainder to charity and directed the Trustees to pay the widow all net income, or if need be such part of the corpus as may be necessary for the *comfort, maintenance* and *support of my wife:*

> *"a request in writing to my Trustee made by my wife stating that the sum requested by her is needed for her comfort, maintenance and support shall be authority in my Trustee to pay unto her any sum so requested."* (Emphasis supplied.)

The government contended that the widow was given the unlimited right to invade the corpus of the trust and absorb any part or all thereof for her comfort, support, and maintenance and therefore the value of the charitable bequests could not be ascertained, and hence could not be deducted from the gross estate for the purpose of computing the net estate subject to tax.

The Court announced two principles which are significant in considering the Frank E. Washburn Trust Agreement. The Court stated:

> *"Someone must determine what the term 'if need be' means, also what the phrase 'may be necessary' for the comfort, maintenance and support means and the one*

> *to determine that within reasonable bounds is the Trustee."* (Emphasis supplied.) (In the case at hand that is The Boatmen's National Bank of St. Louis.)

It was further held by the Court that under the will the widow could not cut off the charitable bequest at her *whim,* because if the sum requested was not found, in the good faith judgment of the trustee, to be needed to maintain the widow in a manner befitting her station in life, then no invasion could be made. The charitable deduction was allowed in full.

It is to be noted that in *Lucas,* the will itself did not limit the invasion *to the manner befitting her station,* i.e., *the manner in which she has been accustomed to live,* but the Court determined *that such was the intent of the testator.* The Court further stated that if the Trustee should pay to the widow any sum stated by her to be required for her living, without itself determining the need thereof, the Trustee would be in violation of its statutory duty and could be surcharged for the amount.

Again there is no other conclusion to be reached but that paragraph 5 of the trust agreement furnishes an ascertainable standard and accordingly the charitable deduction must be allowed. That portion of the *Lucas* opinion is most appropriate to us here:

> *". . . The entire will shows that the power of the widow is limited and restricted by the judgment of the trustee. The desire of the testator is apparent. His humane purposes after providing amply for his widow, to assist unfortunate and afflicted humanity should not be destroyed by a strained and almost ridiculous construction of the will."*

The purpose and intent of paragraph 5 of the Trust Agreement, and therefore its meaning, is to provide that Lucy Tullock Washburn is to have everything needed to

enable her to live in the manner in which she had been accustomed to live, but only, and not otherwise, if the Trustee should determine in good faith that her financial circumstances were such as to make it necessary or advisable to invade the corpus of the Trust Estate for such purpose. In making such determination of necessity or advisability the Trustee had to consider that Lucy Tullock Washburn owned outright, over 1/2 million dollars in assets invested in income producing property, that she would and did receive another $110,000.00 at the death of Frank E. Washburn; and that she would have in addition thereto the income for life from another quarter of a million dollars in assets from his Trust Estate.

The litigation history of the ascertainable standard relating to charitable remainders, as partially hereinbefore set out, can be summarized with the phrase *on whom does the risk fall* or *wherein lies the risk.* If the Government, by the terms of the instrument, is at the *mercy* or *whim* of a beneficiary who can lawfully divert the charitable interest then surely no deduction should be allowed. If, however, the instrument provides adequate safeguards in the form of a disinterested trustee who must perform within the limits prescribed by the applicable state law with respect to that portion designated for charity and no beneficiary is enabled to divert such portion for noncharitable purposes, then clearly the Government bears no risk other than the *general uncertainty that attends human affairs.* (*Ithaca*)

3. The Tenth Circuit Court of Appeals erred in dismissing Petitioner's Motion to Dismiss Appeal which Motion was filed on the grounds that the Notice of Appeal by the United States was not filed within sixty (60) days from the date of the judgment appealed from in the District Court.

Petitioners request this Court to declare the denial of Petitioner's Motion to Dismiss the appeal by the United States from the District Court to be error. Consideration of this point does not appear in the Tenth Circuit's decision. Grounds for said motion to dismiss are that the notice of appeal was not filed within sixty (60) days from the date of the judgment appealed from as required by Rule 73(a) of the Federal Rules of Civil Procedure.

The United States contends that since a monetary figure did not appear in the Memorandum of Decision handed down by the District Court on December 23, 1966, a judgment as contemplated for the purposes of appeal was not in existence at that time. It is the Government's contention that the critical point of time began on June 1, 1967, when an entry, showing the amount of money to be refunded was entered in conformity with the judgment rendered December 23, 1966. Consequently, the Notice of Appeal filed July 28, 1967, was timely in its view.

The District Court in its order for summary judgment, stated:

> *"There is no dispute among the parties as to the amount of the refund to which plaintiffs (petitioners herein) would be entitled should this court find that the claimed deduction should be allowed. Having so found, and there remaining nothing further for determination, the court directs that the plaintiff's motion for summary judgment be granted, and that the motion of the defendant be denied. It is so ordered."* (Emphasis supplied.)

The June 1, 1967 entry did nothing more than to recite in dollars and cents the amount to be refunded which amount was known by all concerned and was not in dispute.

In *United States* v. *F. & M. Schafer Brewing Co.*, 78 S.Ct. 674, Mr. Justice Whittaker stated that a judgment for money is final for the purposes of Rule 73 (a) if the amount is either shown in dollars and cents or the means for determining the amount is stated.

The Memorandum of Decision by the District Court states:

> "There is no dispute among the parties as to the amount of the refund. . ."

Certainly this tells us that the amount was known by both parties and was a fixed figure to be obtained by strictly mechanical means. This figure (the refund) simply depends upon the allowance of the charitable deduction claimed. In granting the Summary Judgment to the plaintiffs, the charitable deduction claimed on the estate tax return was given judicial sanction thus paving the way or *affording the means* for determining the amount. Accordingly, the time to appeal under Rule 73 (a) began to run from the date of docket entry by the Clerk of the Court:

> "There was entered on the docket December 23, 1966, a MEMORANDUM OF DECISION—granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment—a copy of which is enclosed."

This is another area of general importance to the federal judicial system. Litigants should be entitled to know when a case is at rest. The action of the Court of Appeals in accepting this long-delayed appeal, if left undisturbed, will continue in federal judicial procedure the existing uncertainty of the date on which a case has been finally decided.

CONCLUSION

Wherefore your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit to the end that this cause may be reversed.

ROBERT B. LANGWORTHY
GLENN THOMAS
JAMES J. MELCHING
Floor Three, Union National Bank Building
Kansas City, Missouri 64106
Attorneys for Petitioners

Of Counsel:

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY
Floor Three, Union National Bank Building
Kansas City, Missouri 64106
HOMER DAVIS
Leavenworth, Kansas
LEWIS, RICE, TUCKER, ALLEN & CHUBB
611 Olive Street
St. Louis, Missouri 63101

CERTIFICATE OF COUNSEL

The undersigned, Robert B. Langworthy, counsel of record for petitioners, hereby certifies that the above and foregoing petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit is submitted in good faith and believed to be meritorious.

ROBERT B. LANGWORTHY